FILE COPY

No. 17

In the Supreme Court of the United States

OCTOBER TERM, 1933

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, TEXAS & NEW ORLEANS RAILROAD COMPANY ET AL., APPELLANTS

v.

STATE OF LOUISIANA, LOUISIANA PUBLIC SERVICE COMMISSION, LOUISIANA HIGHWAY COMMISSION ET AL., RESPONDENTS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

SEPTEMBER, 1933

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No. 17

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Texas & New Orleans Railroad Company et al., appellants,

v.

STATE OF LOUISIANA, LOUISIANA PUBLIC SERVICE COMMISSION, Louisiana Highway Commission et al., respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 273) is reported in *State of Louisiana et al.* v. *United States et al.*, 2 F.Supp. 545. The report of the Interstate Commerce Commission (R. 11) is reported in *Increases in Intrastate Freight Rates (Part 5, Louisiana)*, 186 I.C.C. 615. Also involved are the report and supplemental report of the Commission (R. 62, 109) in *Fifteen Per Cent Case, 1931, Ex Parte,*

No. 103, *In the Matter of Freight Rates and Charges*, 178 I.C.C. 539, 179 I.C.C. 215.

JURISDICTION

The final decree of the District Court was entered December 27, 1932 (R. 278). Petition for appeal was filed January 19, 1933, and allowed the same day (R. 281). The jurisdiction of this court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220 (U.S.C., Title 28, Sec. 47) and Section 283 of the Judicial Code, as amended by Act of February 13, 1925 (C. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345)).

QUESTIONS

Following the establishment of increases in interstate rates pursuant to authority granted in a "general revenue case" under section 15a of the Interstate Commerce Act (*Fifteen Per Cent Case, 1931*), and following the refusal of a State to permit carriers operating therein to make corresponding increases in a considerable body of their intrastate rates, the Interstate Commerce Commission, in a proceeding under section 13 (3) and (4) of said Act, entered an order requiring that the increases be made, to the end that said intrastate rates bear their just share of maintaining the transportation system.

The questions presented are (1) whether the order of the Commission was a valid exercise of its authority to remove unjust discrimination against interstate commerce caused by rates imposed by State authority, and (2) whether the Commission's findings of fact in support of its order were adequate.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

Nature of Appeal

This is a direct appeal by the United States, the Interstate Commerce Commission, and interstate carriers by railroad operating in Louisiana from a final decree (R. 278) of the District Court for the Eastern District of Louisiana, sitting as a specially constituted three-judge court, permanently enjoining and setting aside an order of the Commission.

The order in question

The Commission's order (R. 2) was issued in exercise of its power (Interstate Commerce Act, sec. 13 (3) and (4)), to remove unjust discrimination against interstate commerce caused by rates imposed by State authority; and it prescribed increases in the intrastate rates [1] of interstate railroads [2] operating in Louisiana in amounts equal to the increases in interstate rates on corresponding traffic that had been theretofore established by said railroads, pursuant to authority granted in *Fifteen Per Cent Case, 1931*, 178 I.C.C. 539, 179 I.C.C. 215.

[1] On traffic as to which the Louisiana Commission had refused to authorize increase in the rates—37 commodities and all less-than-carload traffic.

[2] Including railroads lying wholly within the State, if engaged in interstate commerce.

Proceedings before the Commission

The Commission proceeding, *Increases in Intrastate Freight Rates, Part 5—Louisiana*, 186 I.C.C. 615, in which the order was entered, was an outgrowth of the *Fifteen Per Cent Case, 1931*, just above mentioned. The latter was a "general revenue case" instituted in June 1931 by application of the railroads throughout the country asserting that an emergency existed and asking for authority to make a general increase of 15 per cent in their freight rates and charges. Specifically, the carriers sought special permission to file tariffs providing for such an increase in blanket supplement form, and a determination by the Commission that those tariffs, when so filed, might become effective without suspension.[3] Basically, they relied upon section 15a (2) of the Act, which provides that:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for main-

[3] Whenever the carriers file schedules proposing changes in their rates the Commission may, either upon complaint or its own initiative, enter upon a hearing in respect of the lawfulness thereof, and may pending the hearing suspend the schedules. Section 15 (7) I.C. Act. The carrier's application sought assurance in advance that this suspension power would not be exercised. Precedent for the relief sought and procedure followed is afforded by *Increased Rates, 1920*, 58 I.C.C. 220.

> tenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

The above was one of the interrelated provisions of the Transportation Act, 1920, imposing "an affirmative duty upon the Interstate Commerce Commission to fix rates and take other important steps to maintain an adequate railway service for the people of the United States. *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R.*, 257 U.S. 563, 585.

Hearings on the application were held in various parts of the country during the summer of 1931. About 650 witnesses were heard and over 1,000 exhibits were introduced. The case was submitted September 30, 1931, after oral argument at Washington, D.C., lasting 9 days. Applications for like general increase in intrastate rates were pending before the rate regulating bodies of the States and upon invitation of the Commission, most of those bodies cooperated in the interstate proceeding through a selected committee of eight representatives, who sat with the Commission at the hearings and during oral argument, and participated in its deliberations preceding the decision. (R. 78.)

The evidence in support of the application was directed principally to the revenue needs of the railroads, and dealt with the railroads in the aggregate, or according to the three recognized territories, eastern, southern, and western. It shows that, commencing with the second half of the calendar year 1929, traffic had fallen off with progressive rapidity due to the general business depression and also, in very appreciable degree, to the increasing competition encountered from motor carriers, particularly for some kinds of traffic; and that as a result, and despite operating economies, including deep cuts in maintenance expenditures, net railway operating income had shrunk to a level in 1931 which it was estimated would not exceed $553,000,000 for the year,[4] or 2.25 percent on aggregate property value.[5]

The evidence further showed that among the railroads there were some whose earnings would be so reduced that their bonds would be no longer eligible [6] as investments for savings banks, insurance companies and trust companies; that there were others which were faced with the necessity of refinancing

[4] For Class 1 carriers.

[5] Ascertained by using as a base the aggregate carrier property value found in *Increased Rates, 1920*, 58 I.C.C. 220, 229, and adding thereto the net cost of additions and betterments subsequently made.

[6] For example, the New York savings bank standard specifies that earnings must have been 1.5 times fixed charges during 5 of the last 6 fiscal years preceding the investment, and in the fiscal year next preceding. Bonds previously acquired, however, would not necessarily have to be sold. (R. 80.)

large issues of bonds of early maturities; and that there were still others, of previous unquestioned financial standing, which would probably fail to earn all their interest requirements.

Evidence was introduced to show that under existing market conditions for securities, the normal channels of financing refunding operations and raising new capital were virtually closed to the railroads. There had been a serious decline in the value of railroad bonds, and particularly of the overlying and refunding bonds which, with few exceptions, were the only medium available on which the carriers could borrow money for refunding or other capital expenditures. And along with the decline in the market value of railroad bonds there had been a tremendous shrinkage in the market value of railroad stocks.

While the carriers recognized that all industries were suffering from the depression, they considered that an increase in their rates was justified as a measure vital to their credit standing and to stabilize an industry upon which all others were dependent. They also emphasized that the increase proposed would not produce additional income sufficient to raise their total return on aggregate property value to the full "fair return" of 5.75 percent,[7] and that, therefore, all that they were seeking was partial relief from the burdens confronting them. As estimated by them (R. 78) the 15 percent increase in rates sought would, if there were no consequent falling off

[7] Prescribed in *Reduced Rates, 1922*, 68 I.C.C. 676, as the fair return contemplated by sec. 15a (3), I.C. Act.

in traffic, produce additional revenue of $502,000,000 which, after income tax and other deductions, would raise net operating income to $985,000,000, or 4.01 percent on aggregate property value arrived at as aforesaid.

The carriers offered no evidence with respect to the rates on any particular commodity or kind of traffic. They offered virtually no evidence as to the effect which the proposed 15-percent rate increase would have on the movement of all or any traffic. They presented no witnesses familiar with traffic conditions and resisted the attempts of shippers to call their traffic officials to the stand (R. 79, 96). On the other hand, shipper interests, collectively representing the great bulk of the carriers' traffic (R. 87), presented "a mass of definite and concrete evidence" on the general industrial collapse, on the condition of individual industries, and as to the effect which a 15-percent rate increase would have on traffic and revenue (R. 97). And, as said by the Commission, it approached the "question with a background of experience with railroad rates, and the conditions under which they are made and can be maintained", much of it recently acquired in "extensive investigations of class rates and the rate adjustments on particular commodities" and "in extensive inquiries into motor transportation"[8] (R. 92).

[8] See *Coordination of Motor Transportation*, 182 I.C.C. 263.

The Commission's conclusion was that "a 15 percent increase in all freight rates and charges would increase revenues, if at all, only temporarily and that its ultimate effect, not very long postponed, would be to harm rather than help the railroads" and that, moreover, "such an increase would raise the rates upon many kinds of traffic above a just and reasonable level" (R. 97).

The Commission, however, suggested a substitute measure of relief under which much smaller increases on specified commodities would be allowed. The suggested increases varied from 6 to 12 cents per ton to 2 cents per 100 pounds, subject to a maximum increase of 10 percent in the charge on any shipment.[9] Certain commodities and particularly agricultural products [10] were altogether excluded and the increases on others were tempered (R. 98). The increases were to be superimposed upon the basic rates and were termed "surcharges." They were to expire March 31, 1933, unless extended beyond that time (R. 110).[11]

The Commission plan, as first suggested, imposed as a condition to the rate increases that the income therefrom be pooled for distribution in the first

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[9] The exact amounts of the increases are shown in the appendix to the supplemental report in the *Fifteen Per Cent Case*, 179 I.C.C. 215 (R. 130).

[10] Not all agricultural products were excluded, see List D in appendix authorizing an increase of 1 cent per 100 pounds on a long list of agricultural products (R. 132).

[11] The surcharges were extended until September 30, 1933 (191 I.C.C. 361).

instance among the carriers who fail to earn their fixed charges (R. 100). On petition of the carriers, representing that this plan could not as a practical matter be applied and asking that they be permitted to make distribution of the pooled money to carriers, failing to earn their fixed charges, on a loan basis, the Commission approved the rate increases without the imposition of the condition [12] (R. 111).

As above explained, technically this authority was in the form of special section 6 permission to file blanket supplements providing for the increases, and the Commission's assurance that they would be allowed to take effect without suspension. The authority granted was subject to the proviso—

> that the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates, or schedules of rates, as provided by the Act (R. 16).

There was no finding that each and every rate so increased would be a reasonable rate. The findings were adapted to a case made under Section 15a for general increases in rates, the Commission stating, for example, that:

> revenues had become depleted to such an extent as to threaten the ability of the carriers to continue to furnish such transportation services as the public needs and must have. The freight articles selected by us in this connection were those for the transportation of

[12] The Commission stated, however, that it relied on the carriers to carry out their "loaning plan" (R. 113).

> which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable rates (R. 110).

The Commission estimated that the authorized increases would "produce between one hundred million and one hundred and twenty-five million dollars increased revenue if applied *both State and interstate*" which should, it believed, "cover deficiencies in interest on fixed interest obligations with a substantial balance left over" (R. 99, 15). (Italics ours.)

Pursuant to the permission granted, the railroads throughout the country, including those operating within the State of Louisiana, added the increases to their interstate rates, such increases becoming generally effective January 4, 1932. Most of the States authorized like increases in intrastate rates. In a few States, however, authority to make the increases was denied in whole or in part, whereupon the carriers filed petitions invoking the Commission's action under section 13 (3) and (4) of the Interstate Commerce Act. By order of April 4, 1932, the Commission instituted an investigation to determine whether the refusal of said States to permit the carriers to increase their "intrastate rates causes or will cause * * * any unjust discrimination against interstate or foreign commerce; and, if so, what rates shall

be prescribed to remove such unlawful * * * discrimination." All railroads subject to the jurisdiction of the Commission operating within those States were made respondents to the proceeding, and in each instance the State authorities were duly notified (R. 14).

The investigation was divided into several parts, one for each State whose rates and charges were brought into question. Each part was presented on its own separate record. Hearings in Part 5-Louisiana were held at New Orleans, commencing March 5, 1932, at which the State of Louisiana was represented by its Public Service Commission, its Highway Commission, and various shipping interests.

September 29, 1932, the Commission issued its report, *Increases in Intrastate Freight Rates*, 186 I.C.C. 615, dealing with all parts of the proceeding except three which had not then been heard. The report, after preliminary general discussion, reviews the evidence developed of record in each of the separate parts. Part 5-Louisiana is dealt with on pages 640 to 643 (R. 35–38). The Louisiana Commission had authorized the increases in part but refused to allow them on some 37 commodities and all less-than-carload traffic (R. 35). The Commission's ultimate finding was that in view of the surcharges which had become effective in the interstate rates on the classes and commodities involved in the proceeding, the respondents' intrastate rates in Louisiana on the same classes and commodities, to which no corresponding surcharges had been added, resulted

and would result in unjust discrimination against interstate commerce (R. 37). Pertinent subordinate findings supporting this ultimate finding were also made, and these are quoted and their sufficiency pointed out in a subsequent section of this brief.

At that time the Commission made no order but gave the State Commissions opportunity to permit the carriers in their several States to remove the unjust discrimination against interstate commerce by increasing their intrastate rates in the amount of the interstate surcharges. The Louisiana Commission declined to do so and on November 7, 1932, the order which is here sought to be enjoined was made and entered. (R. 2.)

Proceedings in Court Below

The bill of complaint to enjoin and set aside the order was filed November 16, 1932, by the State of Louisiana, the Louisiana Public Service Commission and the Louisiana Highway Commission. (R. 1.)

The United States and the Interstate Commerce Commission were named defendants. All the railroads affected intervened in defense of the order (R. 157, 158). The case was submitted to the Court upon the pleadings, the reports and orders of the Commission in the *Fifteen Per Cent Case, 1931* and the *State Rates Case*, and a certified copy of the testimony and exhibits introduced before the Commission in the latter case.

December 14, 1932, the Court rendered its opinion, holding that an interlocutory injunction should issue,

and on the same day entered its interlocutory decree (R. 273, 276). Following the filing of a stipulation that the hearing had might be considered as a final hearing of the case (R. 277) the Court, on December 27, 1932, entered its final decree making the interlocutory injunction perpetual (R. 278).

SPECIFICATION OF ERRORS

The following errors of the District Court are urged herein.

1. In setting aside, annulling, and permanently enjoining the Commission's order of November 7, 1932.

2. In holding that the Commission had not found that the interstate rates, to the level of which the Louisiana intrastate rates were ordered to be raised, were just and reasonable.

3. In holding that in a proceeding for a general increase in rates under section 15a the law requires that, before the same can be authorized, the Commission must find each and every rate to be just and reasonable.

4. In holding that findings, essential to support the order, were lacking.

5. In holding that the Commission did not find that the revenue of the carriers would be increased by the increases which it prescribed in the Louisiana intrastate rates.

6. In holding that the Commission's findings in respect of future effect of the increases in intrastate rates upon the carriers' revenues were insufficient to support the order.

7. In giving consideration to the fact that the increases in interstate rates were not required by mandatory order of the Commission but were instead only authorized.

8. In not dismissing the bill of complaint.

SUMMARY OF ARGUMENT

1. The Commission's order requiring that the State rates of interstate railroads within *Louisiana* be increased to correspond with the increases, established in their interstate rates pursuant to *Fifteen Per Cent Case, 1931*, was one for removal of unjust discrimination against interstate commerce in the sense of "preventing the depletion of interstate revenues by discriminating intrastate rates". *New England Divisions Case*, 261 U.S. 184, footnote, page 190. Furthermore, the Commission's action in ordering said State rates to be increased, as well as its earlier action authorizing the interstate increases, was in performance of the affirmative duty imposed on it by Transportation Act, 1920, "to fix rates and take other important steps to maintain an adequate railway service" for the country. *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R.*, 257 U.S. 563, 585.

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system" (idem. 585). The States are using the interstate system for intrastate traffic and, if that traffic does not bear its just share of maintaining the system and so casts a dispropor-

tionate burden on interstate business, unjust discrimination against interstate commerce in a very real sense must be the result. The Commission's duty, under section 13 (4), to prescribe State rates that will cover their just share of the burden is thus seen to be in "dovetail relation" with its duty, under section 15a, to adjust interstate rates to secure to the carriers a fair return on interstate business, the both duties being intended to advance the Act's purpose that the national transportation system shall be adequately maintained (idem, 586, 587).

2. The lower court's holding that the Commission's order increasing the intrastate rates was invalid for the reason that it had never found the corresponding interstate rates, as increased pursuant to *Fifteen Per Cent Case, 1931*, to be reasonable rates, loses sight of the fact that the parent proceeding, *Fifteen Per Cent Case, 1931*, was a general-revenue proceeding authorizing general increases in interstate rates in performance of the Commission's affirmative duty to secure urgently needed revenue for maintenance of the national transportation system, and that the instant proceeding under section 13 (4) occupies a "dovetail relation" to the parent proceeding under section 15a. *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R.*, 257 U.S. 563, 586.

Although there was no finding that each and every rate, so increased, would be a maximum reasonable rate, the Commission did, among other things, find that the freight articles selected for the increases "were those for the transportation of which we be-

lieved the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation, and without bringing about an undue disturbance in business conditions, or transgressing the bounds of maximum reasonable rates."

In authorizing the increased interstate rates the Commission necessarily dealt with them in the aggregate or in broad classes but attached a saving clause to the effect that the resulting rates should be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates. In thus dealing with rates it followed a method long recognized as necessary in such character of case and which must be regarded as sanctioned by section 15a since it had its origin in the emergency needs with which the national transportation system was faced in 1920. In *Increased Rates, 1920*, 58 I.C.C. 220, horizontal country-wide increases were authorized in similar manner. In state rates cases under section 13 (4), which grew out of the section 15a case, the interstate rates and the revenue needs of the national transportation system determined in this manner were used as bases determinative of the proportionate share to be borne by intrastate traffic. *Wisconsin R.R. Commission Case, supra. New York* v. *United States*, 257 U.S. 591.

Section 15a, in imposing upon the Commission the duty to make general adjustment of rates when need arises, must be taken to have authorized a method of procedure, making possible the task. Accordingly, the interstate rates, as increased in *Fifteen Per Cent*

Case, 1931, to meet the Act's remedial purpose, are not in this proceeding subject to be questioned on the ground that each and every one of them was not found to be a maximum reasonable rate. They must be regarded as reasonable and lawful rates for the purposes of the authorization, and in this proceeding, under section 13 (4), closely related to the parent proceeding under section 15a, said manner and method of determining the reasonableness of the rates must be regarded as valid for all purposes.

The Federal Commission, alone among the rate-regulating bodies, is under affirmative duty to secure necessary revenue for the national transportation system. In *Fifteen Per Cent Case, 1931*, it determined the amount necessary for the urgent needs there shown, not on the basis that interstate traffic would bear the whole burden but in contemplation that intrastate traffic would contribute its just share. It followed the same course in *Increased Rates, 1920, supra*, and under the doctrine of the *Wisconsin Case, supra*, this is the proper course. The great interference with the Act's remedial purpose which would be worked, if none, or comparatively few, of the States should contribute their proportionate share of a general increase is shown in the last-mentioned case.

3. The Commission's findings in support of its order as one to remove a revenue burden were adequate. It made the ultimate finding of unjust discrimination caused by the failure to increase the rates. It made a detailed statement of revenue out-

come taken from estimates of the carriers in the record as based on traffic for 1931. It discussed the testimony of shippers that traffic would be diverted to trucks by the rate increases, and in substance stated that the situation was about the same as in other parts of the country. It stated the opinion given by traffic men that, despite possible diversion of traffic, the rate increase would produce an increase in revenue.

In the preliminary part of its report the Commission stated that its finding of unjust discrimination in any of the cases was not to be taken as its positive conclusion of revenue effect. On this statement of the Commission the lower court based its conclusion that the Commission had not found that the rate increases would produce additional revenue. But we do not understand that the Commission's findings with respect to the future effect of rates upon revenues have to be positive in any character of case, and in this case it was dealing with a great body of rates under uncertain industrial conditions. The findings which the Commission did make were like those in the *Wisconsin Case*, which was a case of the same character, and those findings coupled with its ultimate finding that unjust discrimination would result constitutes, just as in the *Wisconsin Case*, its judgment that the increases would increase the carriers' revenues.

ARGUMENT

I

THE COMMISSION'S ORDER REQUIRING THAT THE STATE RATES OF INTERSTATE RAILROADS WITHIN LOUISIANA BE INCREASED TO CORRESPOND WITH INCREASES, ESTABLISHED IN THEIR INTERSTATE RATES PURSUANT TO *FIFTEEN PERCENT CASE, 1931*, WAS ENTERED TO PREVENT THE DEPLETION OF REVENUES OF CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT AND IN PERFORMANCE OF THE AFFIRMATIVE DUTY IMPOSED ON THE COMMISSION BY TRANSPORTATION ACT, 1920, "TO FIX RATES AND TAKE OTHER IMPORTANT STEPS TO MAINTAIN AN ADEQUATE RAILWAY SERVICE."

The Act to Regulate Commerce, 1887, was designed principally to put an end to discrimination in railroad rates and service as between shippers and to prevent the charging of excessive rates. Its only provisions prior to 1920 "that enured to the benefit of the carriers were the requirements that rates should be reasonable in the sense of furnishing adequate compensation for the particular service rendered and abolition of rebates." *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R.*, 257 U.S. 563, 585. Transportation Act, 1920, introduced the new policy of promoting, through regulatory legislation, an adequate and efficient transportation service for the country. The provisions of said Act, and the relation of each [13] to this great purpose, have been frequently discussed and explained in decisions of this court. "The most novel and most important feature" of the 1920 Act was section 15a (above quoted)

[13] See particularly *New England Divisions Case*, 261 U.S. 184, and footnote, page 190; *Dayton-Goose Creek Ry.* v. *U.S.*, 263 U.S. 456.

requiring the Commission "so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of railway property used in transportaion." (Idem. 584.) This provision, and others in the 1920 Act, "imposed an affirmative duty on the * * * Commission to fix rates and take other important steps to maintain an adequate railway service for the people of the United States." (Idem. 585.) The new Act aimed "to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden." *Dayton-Goose Creek Ry.* v. *U.S.*, 263 U.S. 456, 478. "The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured." *New England Divisions Case,* 261 U.S. 189.

In addition to section 15a, other noteworthy provisions for the preserving of carrier revenue in the interest of an efficient transportation service were those empowering the Commission "to permit pooling of traffic and earnings; to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker

competitors; *to prevent the depletion of interstate revenues by discriminating intrastate rates* * * *" *New England Divisions Case*, 261 U.S. 184, footnote, page 190.

The provision last referred to (Sec. 13(3) and (4)) is the one directly involved in this case. It provides in part (text in Appendix) that:

> Whenever * * * the Commission, after full hearing, finds that any such rate, fare, * * * or practice (imposed by State authority) causes any undue * * * preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, *or any* * * * *unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful*, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such * * * discrimination * * *." Italics supplied.

Prior to the enactment of the above the Commission, acting under section 3, had in several cases found that State rates unduly preferred state shippers to the prejudice of interstate shippers, and had entered cease and desist orders *Shreveport Case*, 234 U.S. 342. But there was then no prohibition in the Act against "unjust discrimination against interstate

commerce" in the sense of State rates that fail to bear their just share of the burden of maintaining the carriers' revenues and the national transportation system. And there was then no power in the Commission to act directly on the State rates by prescribing the rates to remove the discrimination.

Following Transportation Act, 1920, which, among other things, terminated federal control, the carriers applied to the Commission for authority to make general increases in all rates and fares. As in *Fifteen Per Cent Case, 1931*, the technical relief sought was the Commission's approval of increases in advance of the filing of tariffs while basic reliance was placed upon section 15a and the new duty of the Commission to take affirmative steps to promote the welfare of the national transportation system. In its decision on the application, *Increased Rates, 1920*, 58 I.C.C. 220, 246, the Commission authorized horizontal increases in freight rates ranging from 25 to 40 percent depending upon designated territorial rate groups, and increases in all passenger fares and charges of 20 percent. Subsequently, corresponding increases in intrastate fares and rates were permitted to be established in most of the States. Some of the State rate regulating bodies, however, denied, either in whole or in part, the carriers' applications for authority to make the increases, whereupon the carriers invoked the Commission's jurisdiction under section 13 (4), above quoted. Several of the Commission's orders, entered in the proceedings which followed, were attacked in the courts and in each case which

reached this Court the Commission's order was upheld.[14]

In *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R.*, 257 U.S. 563, this Court had before it for the first time an order of the Commission entered in a proceeding under section 13 (4) of the Act. The case involved the following facts: The Wisconsin Commission had permitted intrastate freight rates to be increased by the same percentage as had been established interstate pursuant to the findings in *Increased Rates, 1920, supra*, but had denied the 20 percent increase in passenger fares and excess-baggage charges and also the pullman surcharge on the ground that a state statute fixed a maximum of 2 cents a mile for passenger fares and charges. Actual intrastate fares were on the basis of 3 cents per mile under order of the Director General made during federal control, and the 20 percent increase would have raised the basis to 3.6 cents per mile. After their application to the State Commission had been denied the carriers invoked the federal commission's jurisdiction, and in the proceeding which followed[15] the Commission found that the failure to make the increases had resulted (1) in undue prejudice to interstate travelers and (2) in unjust discrimination

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[14] *Wisconsin R.R. Comm. Case, supra; New York* v. *United States*, 257 U.S. 591; *N.C. & St. L. Ry.* v. *Tennessee*, 262 U.S. 318. In *North Dakota* v. *C. & N.W. Ry.*, 257 U.S. 485, a bill was brought in this court to enjoin the railroads from complying with Commission order. It was dismissed on procedural grounds.

[15] *Wisconsin Passenger Fares*, 59 I.C.C. 391, 396.

against interstate commerce. Its order required the removal thereof "by increases in all intrastate passenger fares and excess-baggage charges and by surcharges corresponding with the increases and surcharges ordered in interstate business" (idem. 566). In the court suit [16] this order was upheld by the lower court, and the latter's decision was affirmed by this Court.

In the opinion in the case, this Court held that, although the showing of undue prejudice against interstate travellers was sufficient to justify the Commission's action as to a large class of fares, the order in its full scope could not be supported on the findings made of undue prejudice to interstate travellers. In its statewide application the order was upheld on the ground that the intrastate fares worked an unjust discrimination against interstate commerce as a whole, that is, discrimination in the sense that they were not producing their just share of carrier revenue necessary to adequately maintain the national transportation system. In reaching its decision this Court pointed out, as above mentioned, that Transportation Act, 1920, imposed on the Commission the new and affirmative duty to promote the maintenance of an adequate railway service for the country; that this duty was to be performed by fixing rates which would produce earnings enabling the carriers to pro-

[16] The suit was instituted by the railroads under section 266, Judicial Code, to enjoin the State Commission from interfering with the establishment of increases in compliance with the federal order.

vide such service and by exercise of other powers directed, broadly speaking, to the prevention of waste and promotion of economies.[17] As bearing directly on the Commission's enlarged power over intrastate rates in its relation to the new duty to affirmatively promote the maintenance of adequate railway service, the Court first emphasized that "intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system" and that, if they are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. Referring to the provision of section 15a that rates are to be adjusted to yield a fair return on aggregate property value, the opinion reads at page 586:

> * * * Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its power to prescribe just and reasonable rates", i.e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, section 13, however, and find the Commission for the first time vested with

[17] For example, the Commission powers to restrict construction, and to authorize abandonment, of unneeded lines and its powers to promote a fuller use of existing lines and, plant through joint use of lines and terminals, pooling of freight and earnings, car service, unifications or consolidations, etc.

> a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce", it is impossible to escape the dovetail relation between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, or unjust discrimination against interstate or foreign commerce", within the ordinary meaning of those words.

In answer to the appellants' contention that the valuation required for the purposes of section 15a to be ascertained pursuant to section 19a of the Act covers only that part of the carriers' property which is used in interstate commerce and must be segregated from that used in intrastate commerce the opinion reads at page 587:

> * * * The language of section 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

"Congress in its control of its interstate commerce system," the Court said "is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. (Citing cases.) In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field" (idem. 589–590).

In the closing paragraph of the opinion it is said:

> It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception, * * *

The above referred to a saving clause contained in the Commission's order, similar to that contained in the order now before this Court, and which provided that the order was made without prejudice to the right of the authorities of the State or of any other party in interest to apply in the proper manner for a modification of the order as to any specified intrastate fares or charges if the latter were not related to the interstate fares or charges in such a way as to contravene the provisions of the Interstate Commerce Act.

New York v. *United States*, 257 U.S. 591,[18] involved, similarly as in the *Wisconsin Case*, a Commission order which required increases in intrastate passenger fares and charges corresponding to the increases that had been established in interstate fares and charges pursuant to *Increased Rates, 1920*, 58 I.C.C. 220. In this case, too, the Court sustained the objection that there was not sufficient evidence of discrimination *against persons and localities* to justify the state-wide order, but held that the state-wide order was valid as removing an unjust discrimination against interstate commerce from the revenue standpoint. The Court said at page 601:

> If the lower level of intrastate fares and rates is to be maintained, it will discriminate against interstate commerce, in that it will require higher fares and rates in the interstate commerce of the State to secure the in-

[18] The court proceeding was different in that it was a direct suit under Urgent Deficiencies Act (38 Stat. 219) to set aside the Commission's order.

> come for which the Interstate Commerce Commission must attempt to provide by fixing rates under section 15a of the Interstate Commerce Act, as amended by section 422 of the Transportation Act of 1920, 41 Stat. 456, 488, in carrying out the declared congressional purpose "to provide the people of the United States with adequate transportation." As we have just held in the *Wisconsin Rate Case*, this constitutes "undue, unreasonable, or unjust discrimination against interstate . . . commerce", which is declared to be unlawful and prohibited by section 13, par. 4, of the Interstate Commerce Act, as amended by section 416 of the Transportation Act of 1920, 41 Stat. 456, 484, which the Inter-State Commerce Commission is authorized therein to remove by fixing intrastate rates for the purpose.

In recent decisions this Court has emphasized the necessity that intrastate traffic contribute its just share toward the cost of maintaining the national transportation system. In *Florida* v. *United States*, 282 U.S. 194, it was said at page 211:

> * * * As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate traffic should pay "a fair proportionate share" of the cost of maintenance. * * *.

In *Louisiana* v. *United States*, 284 U.S. 125, this Court said at page 131:

> * * * and it (Congress) has empowered the Interstate Commerce Commission * * * to require the carriers to make and apply on intrastate traffic such reasonable charges as will produce its fair share of the amounts needed to pay operating expenses, provide an adequate railway system, and yield a reasonable rate of return on the value of the property used in the transportation service.

II

THE COMMISSION'S FINDINGS OF FACT FULLY SUPPORT ITS ORDER

1. The findings in support of the interstate rates, as increased by the surcharges, established those rates as lawful and reasonable for the Section 15a remedial purposes herein involved

One of the grounds on which the lower court held the order in this case to be invalid was that the interstate rates, as increased by the surcharges, "were never found to be just and reasonable." (R. 276.) The Commission's report in the *Intrastate Rates Case*, 186 I.C.C. 615, explains the nature of its findings in support of the general increases and for this reason it is here quoted from at some length. In this connection the report reads at page 619:

> There was no finding that each and every rate so increased would be a maximum reasonable rate, because a finding on this point was both impracticable and unnecessary. We did, however, state:
>
> "The freight articles selected by us in this connection were those for the transportation

of which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable rates."

* * * * *

In the administration of the Interstate Commerce Act a definite class of cases has come to be recognized where the paramount question is the general level of rates throughout the country or in territorial parts thereof, i.e., whether the aggregate revenues of the carriers shall be increased or reduced by a change in this general level. These are known as general revenue cases. For reasons which are apparent, it is impracticable in such proceedings to consider the individual rates. It is necessary to deal with rates in the aggregate or by broad classes, and the rights of shippers and carriers with respect to individual rates are protected by a saving clause which makes the general findings without prejudice to subsequent findings in individual situations. The Supreme Court has recognized the practical necessity of dealing with the general rate level in this way. For example, in New England Divisions case, 261 U.S. 184, at pages 197–198, the court referred with approval to the following passage from our report in New England Divisions, 66 I.C.C. 196,203:

"In all such general rate cases we have realized and have held that if we were required

> to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the commission reduced to a state of administrative paralysis."

The report here refers to *Increased Rates, 1920, supra*, and *Reduced Rates, 1922*, 68 I.C.C. 676, both of which were general-revenue cases and the first of which was the "parent" case involved in the *Wisconsin* and *New York State Rates Cases* above described. They are mentioned by the report in connection with *Brimstone R.R. Co.* v. *United States*, 276 U.S. 104, 123, in which the court said, in describing the findings in said cases:

> "Neither case approved 'any specific rate as reasonable in itself or as properly adjusted with respect to other rates nor did it justify in advance any rate which might be published as a result thereof.' In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates, and the propriety of rates to which the Brimstone Company was party was not the subject of particular investigation or consideration." [19]

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[19] The *Brimstone Case* involved section 15 (6) which empowers the Commission to prescribe divisions of joint rates for the past, e.g., retroactive divisions, whenever the joint rates were established pursuant to its finding or order The case held that joint rates, increased and reduced purusant to *Increased Rates, 1920*, and *Reduced Rates, 1922*, were not established pursuant to finding or order of the Commission. The court emphasized the rules that a statute, operating retroactively, should be strictly construed.

Continuing, the Commission's report reads:

> Ex Parte No. 103 also was a general-revenue case, and it dealt in the aggregate with broad classes of rates throughout the entire country. It approved general increases of those classes without consideration of individual rates and protected the rights of shippers and carriers with respect to such rates by the saving clause, already quoted, that the "resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates, as provided by the act." Revenue considerations affecting the operations of the carriers in their entirety, both intrastate and interstate, were paramount in the findings, and the existing rates to which it was contemplated that the increases would be applied were the result of a comprehensive system of public regulation which had been in force, in both the Nation and the States, for many years (R. 16–17).

Bearing on the same point, the Commission's report later reads at page 624:

> In *Georgia Comm.* v. *United States*, 283 U.S. 765, 770, the court said:
>
> "It is true that when State rates are assailed on the ground that they result in undue prejudice to interstate shippers or discrimination against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. * * *"

* * * As before indicated, we made no finding that each and every rate would be reasonable because such a finding was both impracticable and unnecessary. We did state that the freight articles selected for the application of the surcharges were those for the transportation of which we believed the rates could be somewhat increased without transgressing the bounds of maximum reasonable rates.

The important thing is the principle underlying the statement above quoted from the Georgia case. * * * The Georgia case did not emanate from a general-revenue case and dealt chiefly with "undue prejudice and discrimination to interstate shippers and localities", as is made clear by the comments on page 773 of the court's opinion. When a "disparity of intrastate rates" is found to exist, the question is whether it is just and right that this disparity should be corrected by requiring an increase in State rates. Obviously this should not be done unless the fault lies in those rates. If the fault is in the interstate rates, it is they which should be changed. Where specific rates are in issue and no general increase in the level of rates to meet revenue needs is involved, plainly the fault is to be located by applying the yardstick of interstate rates definitely found to be reasonable. Where the disparity is the outgrowth of a general-revenue case in which rates were dealt with in the aggregate or by general classes, the fault cannot be so located. Nevertheless it is possible to apply the same test to the intrastate

> rates as was applied to the interstate rates, and this is, we believe, the essential principle to be followed. To do otherwise would, as the court suggested in the Wisconsin case, "completely block the remedial purpose of the statute." Manifestly both classes of rates must be dealt with in the same way, and subject to similar reservations protecting the future, if the transportation needs of the country are to be met, to say nothing of the extraordinary conditions and the serious financial emergency by which we were confronted in Ex Parte No. 103 (R. 20–21).

What is above said as to the impracticability in a general-revenue case of dealing with the rates as individual rates is not new. This court and all concerned are familiar with the manner in which the Commission dealt with interstate rates in *Increased Rates, 1920, supra.* And in the first *State Rate Case* growing out of that case, *The New York Passenger Fares Case,* 59 I.C.C. 290 (sustained in *New York* v. *United States, supra*), it was explained, as in the instant case, that the rates could not be dealt with as individual rates,[20] the Commission saying at page 294:

> This proceeding presents a practical question which we have endeavored to deal with in a practical way. The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities

[20] The fact that the rates were not dealt with as individual rates is emphasized in Commissioner Eastman's dissent. 59 I.C.C. 303.

> are immediate and, in the interest of the public, cannot be permitted to await the consideration in detail of individual fares, charges, and rates. The record shows that the respondent carriers perform the services here in question under substantially similar circumstances and conditions, whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. The present record warrants the findings hereinafter made. Those findings are without prejudice to the right of the authorities of the state of New York or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any fares, charges, or rates on the ground that the latter are not related to the interstate fares, charges, or rates in such a way as to contravene the provisions of the interstate commerce act.

The above saving clause in the *New York Fares Case* in respect of individual fares or rates is substantially the same as that attached to the findings in the present case.

Reverting, then, to the interstate rates in the present case, as the Commission plainly states, they were not dealt with as individual rates. The *Fifteen Per Cent Case, 1931*, being a general-revenue case of great urgency and involving literally thousands of individual rates the Commission "dealt in the aggregate with broad classes of rates" approving "general increases

of those classes without consideration of individual rates" but protecting the rights of shippers and carriers by a saving clause similar to that in the *state rates cases*, namely, that "the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates as provided by the Act" (R. 17).

The record made in the case was exhaustive. The evidence introduced by the carriers and by the security holders' committee, while largely confined to the revenue needs and impaired credit of the railroads, was comprehensive on these vital issues. And, due to the vigorous opposition of shippers representing the great bulk of the carriers' traffic, the Commission had before it a mass of "definite and concrete" evidence on the effect of rate increases on the traffic. As said by the Commission:

> "It is not inappropriate to say that we approach this question with a background of experience with railroad rates and the conditions under which they are made and can be maintained. We deal with hundreds of rate complaints every year, and in recent years have, in addition, carried on most extensive investigation of class rates and the rate adjustments on particular commodities. Evidence as to commercial and industrial conditions has been prominent in all of these investigations. We have also made extensive inquiries into motor transportation and are informed in regard to transportation by waterways and pipe lines, and we know the extent to which the

railroads have reduced rates to meet such competition" (R. 92).

Only a reading of the Commission's two reports can fully portray all the matters and elements considered. The question of the reasonableness of the rates was at all times before it, and necessarily so because of the effect of rate increases on "distressed industry." The question of the so-called "revenue effect" of a rate increase, i.e., whether a rate increase would "drive traffic from the rails" was also at all times a matter for particular consideration and investigation.

Among other of the Commission's findings in support of the rate increases, the following should be emphasized: That, due to the industrial depression and the rapid development since the depression began of other competitive forms of transportation, the carriers' revenues had become depleted to such an extent as to threaten their ability to continue to furnish such transportation services as the public needs and must have (R. 110); that the carriers' credit had become impaired and their securities subject to distrust verging on panic (R. 98); that "the freight articles selected by us in this connection were those for the transportation of which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable rates" (R. 110); and that the carriers

should be authorized to make the specified increases (R. 110).

The above findings amply support the urgent need for additional revenue. They support the increased rates as reasonable rates with all the certainty practicable or necessary in a general-revenue case, where rates are dealt with in broad classes. And, furthermore, the Commission found that they should be, and they were in fact, authorized.

Section 15a must be, and has been, construed as authorizing just such general rate increases as were here found necessary. It originated out of the emergency needs with which the transportation system was confronted in 1920; and as soon as possible following its enactment, the general increases in *Increased Rates, 1920, supra*, were authorized. Since it must be construed as authorizing general revenue proceedings—that is, proceedings for general increases in the rates—it must by the same token have authorized that a practicable procedure be followed, making possible the task. Compare *Wisconsin Case, supra*, 588.

Accordingly, the interstate rates, as increased in *Fifteen Per Cent Case, 1931*, to meet the Act's remedial purpose, are not, in this proceeding, subject to be questioned on the ground that each and every one of them was not found to be a maximum reasonable rate. They were authorized by the Commission in performance of its duty under mandate of section 15a of the Act, and by a method and procedure contemplated by said section and for many years recognized

to be absolutely necessary in a general-revenue case. In this proceeding, under section 13 (4), which is in "dovetail relation" (*Wisconsin Case, supra*) with the parent proceeding under section 15a, it is inescapable that said manner and method of determining the lawfulness and reasonableness which was used in said parent proceeding for purpose of authorizing the interstate increases must be regarded as a valid manner and method of authorizing them, and, therefore, in no wise invalidating the interstate rates for any use within the section 15a remedial purpose.

The Federal Commission, alone among the rate-regulating bodies, is under affirmative duty to secure necessary revenue for the national system whether in times of emergency or at any other time. It determined to the best of its ability the amount of revenue which would meet those urgent needs and at the same time not impose unreasonable rate increases on the traffic selected. It will have been already noted that, in determining the amount of the interstate increase, the Commission assumed that intrastate traffic would contribute its just share. Plainly, under the doctrine of the *Wisconsin case, supra*, the Commission is not expected, in a general-revenue case, to prescribe increases in the interstate rates that will yield the whole needed additional revenue, without reliance on intrastate traffic for its just contribution. If it had to do this as a prerequisite to discrimination proceedings under section 13 (4), i.e., if it had to fix interstate rates in the first instance to include the share justly to be

borne by intrastate traffic and thereafter enforce contribution by the forty-eight States, it would logically follow that when the States had been required to increase their rates the interstate rates would have to be readjusted downward, and, perhaps, by successive steps.

In *Increased Rates; 1920, supra,* as well as in the *Fifteen Per Cent Case, 1931,* the Commission fixed the interstate increases in contemplation that corresponding intrastate increases would be made, and in most States that expectation was realized. So that in those instances where the increases were not allowed, the proceedings to remove the unjust discrimination was, in nature, a fulfilment of the parent case under section 15a and a rounding out of the Acts remedial purpose. The great interference with that purpose which could have been worked if none, or comparatively few, of the States had borne their portionate share, is readily apparent.

It is believed that in giving proper effect to the Act's remedial purpose it is of the utmost importance that it be kept constantly in mind, that, as above said, the Federal Commission, alone among the rate-regulating bodies, has the affirmative duty to secure, through rates adjusted to that end, adequate revenue for the national transportation system. This, when the Commission is called upon to make urgent general rate adjustments, is not rate regulation in the old section 1 meticulous sense. On the contrary, it will be readily appreciated that duties are imposed of countrywide scope and which must be performed, if

at all, in a manner corresponding to their scope. All this, it appears to us, was comprehended in, and recognized by, the Court's decision in the *Wisconsin case, supra.*

2. The Commission's findings in support of the order as one to remove a revenue burden were adequate

Another ground given by the lower court for its holding that the order was invalid was that it lacked the finding that the prescribed rate increases will for the future increase the carriers' revenues (R. 276).

The Commission's ultimate finding of unjust discrimination reads:

> We find that in view of the surcharges which have become effective interstate in the freight rates on the classes and commodities here in question, under our findings in *Fifteen Per Cent case, 1931*, supra, respondents' intrastate rates in Louisiana on the same classes and commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, except in the case of the intrastate rates on sugarcane. We further find that this unjust discrimination shall be removed by applying to the present interstate rates in Louisiana on the said classes and commodities, except sugarcane, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in *Fifteen Per Cent Case, 1931*, supra, on corresponding interstate traffic. (R. 37–38.)

This was followed by the saving clause, above mentioned, similar to that in the *Wisconsin case.*

Supporting its ultimate finding of unjust discrimination the Commission made the following statement from the evidence of record:

> . It is estimated that, based on the traffic of 1931, the application of the surcharges on the excepted commodities would produce additional annual revenue of $26,420 to the Gulf Coast Lines, $53,470 to the Missouri Pacific Railroad Company, $1,848 to the New Orleans and Lower Coast Railroad Company, $108,442 to the Texas & New Orleans Railroad Company, $92,198 to the Texas & Pacific Railway Company, $12,493 to the Kansas City Southern Railway Company, and $101,798 to the Illinois Central. The Louisiana & Arkansas Railway Company would receive $37,911 additional revenue on sand, gravel and crushed stone. Railroad traffic men expressed the opinion that, notwithstanding possible diversion of traffic to other transportation agencies, the addition of the surcharge to the intrastate rates would produce an increase in revenue. (R. 35.)

The above estimates were all supported by separate exhibits of the carriers named (R. 224–230), which were introduced by experienced traffic officials of the railroads.

In *Wisconsin Passenger Fares,* 59 I.C.C. 391, 393, the Commission's finding was:

> Evidence offered by the carriers indicates that if the present intrastate fares are con-

> tinued for one year and if there is the same intrastate travel during that year as in the calendar year 1919, the direct loss to the carriers due to their failure to secure the 20 percent increase in intrastate fares will approximate $2,400,000, and if the 2-cent intrastate fare should become effective the loss would be approximately $6,000,000.

This Court held that this finding was sufficient to sustain the Commission's statewide order. In the *Wisconsin case*, 257 U.S. 563, the Court said at page 580:

> "The report of the Commission shows that if the intrastate passenger fares in Wisconsin are to be limited by the statute of that State to 2 cents per mile and charges for extra baggage and sleeping car accommodations are to be reduced in a corresponding degree, the net income of the interstate carriers of the State will be cut six millions of dollars below what it would be under intrastate rates on the same level with interstate rates." (*Ibid.*, 580.)

Later, in *Florida* v. *United States*, 282 U.S. 194, the Court, referring to the *Wisconsin case*, said:

> "Thus, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra*, (at p. 566) where the question related to the general level of intrastate passenger fares, there were findings as to the effect of the maintenance of the intrastate fares upon the revenues of the carriers, warranting the ultimate finding of undue discrimination against interstate commerce as a whole."

It is true that the Commission's order involved in the *Florida Case*—an order prescribing intrastate rates on logs—was held invalid for lack of findings that the increased rates would produce, or were likely to produce, additional income. But in that case there was total absence of anything of the kind in the report.[21] Instituted by the Georgia Public Service Commission, the case was essentially one of undue prejudice against interstate shippers and confined by the evidence at least to northern Florida. It was peculiar to itself in many other respects. Finally, since it involved but one railroad and one commodity, it was not, like the *Wisconsin Case* and the present case, an outgrowth of a general revenue proceeding to meet emergency needs of the national transportation system.

Because the instant case was of general revenue character involving many commodities and innumerable rates, and because of the urgent transportation needs, even more pressing than in the *Wisconsin Case*, it is believed that the question as to whether the Commission has made adequate findings of future revenue to be derived from the increases should be

[21] Findings as to revenue effect of increases, not much different from those in the present case, will be found in the Commission's reports involved in *Georgia P. S. Com.* v. *U.S.*, 283 U.S. 765; *Alabama* v. *U.S.*, 283 U.S. 776; *Louisiana P. S. Com.* v. *Tx. & N. O. R.R.*, 284 U.S. 125. The first two-named cases involved particularly discrimination against interstate shippers, but the orders were also supported on the revenue findings. The last case was sustainable in its state-wide application—that is, in southern Louisiana—only on the revenue burden feature.

judged, not by the *Florida Case* but by its reports involved in the *Wisconsin Case, supra*, and *New York* v. *United States, supra*.

The lower court points to the fact that the Commission, in the preliminary part of its report, stated that where it made a finding of unjust discrimination and required an increase in the interstate rates, it was to be understood that it concluded that no positive finding in regard to the revenue outcome of the increase could be justified. (276) Even in a case like the *Florida Case* we do not understand that findings of revenue outcome must be positive. But the important thing to be kept in mind is again that the Commission was dealing with the body of many rates. Pressed upon it by shippers and state commission, similarly as in each and every state case, that traffic would be stifled by the rate increases or diverted to trucks and the like; yet it had before it the expert opinion of railroad traffic men, whose everyday problems were just such problems, that the surcharges would produce an increase in revenue. Coupled with the Commission's statement of the detailed estimates of revenue that would be derived, the following is part of its findings as to future revenue effects, namely:

> There is nothing of record which warrants the conclusion that the situation as to fertilizer, cottonseed, cottonseed products, fresh vegetables, or sweet potatoes is different in Louisiana from what it is in other parts of the country, or in surrounding states, where

> surcharges are now being assessed. Similar allegations with respect to the probable effect of truck competition and as to the inability of various commodities to stand any increase, were made in Ex Parte No. 103, and were considered in reaching our conclusions. Nor is there anything to show that the movement of sweet potatoes will be adversely affected by the application of a surcharge thereon without a similar charge on other potatoes.

Coupled with its statements of the detailed estimates of revenue outcome and its statement just above quoted, the Commission's ultimate finding that unjust discrimination would result, constitutes, just as in the *Wisconsin Case*, its best judgment that the increases would for the future increase the carriers' revenues.

III

THE FACT THAT THE INTERSTATE RATES, AS INCREASED BY THE SURCHARGES, WERE ONLY AUTHORIZED WHEREAS THE INTRASTATE RATES WERE ORDERED TO BE INCREASED IN NOWISE AFFECTS THE VALIDITY OF THE ORDER

As further grounds for its conclusion that the Commission's order was invalid, the lower court points to the fact that the Commission "made no order requiring the carriers to apply their proposed interstate surcharges but only granted them permission to do so or not as they elected." (R. 276.) This has reference, doubtless, to the contrast dwelt upon by opposing counsel arising from the fact that the Com-

mission, in operating upon the intrastate rates had done so by mandatory order requiring the increases.

Where a state is opposing an increase in intrastate rates the natural course is for the Commission to use its minimum rate power. Section 13 (4) empowers the Commission to increase the rate by fixing the precise rate or by a minimum rate order such as here entered.

In the *Wisconsin case*, an outgrowth of *Increased Rates, 1920, supra*, the interstate fares and charges were established under just such permissive authority as was here granted to the carriers. That was also true of every other state case growing out of *Increased Rates, 1920*, several of which were never the subject matter of court suit. There are few, if any, intrastate rate cases in which the interstate rates were fixed by minimum rate orders, or otherwise than as maxima rates. On the other hand, the intrastate rates are always prescribed as minima. Where interstate rates are fixed as maxima there is no constraint in so far as the order is concerned, upon the carriers reducing the rates. Whether it be under a maximum rate order or pursuant to authorization as here, the matter of importance is that the rates are established pursuant to determination of the Commission.

Georgia P. S. Com. v. *United States*, 283 U.S. 765, and *Alabama* v. *United States*, 283 U.S. 778, are familiar examples of cases where the interstate rates were prescribed as maxima and the intrastate rates as minima.

The Commission has always been reluctant to use its minimum rate power whether with respect to interstate rates or intrastate rates and except for special situations its universal policy has been to prescribe interstate rates as maxima. Its reluctance to fix intrastate rates at all by order is shown by the fact that in almost every intrastate case it has first issued its report and finding and only issued an order when it became apparent that the state authorities would not comply with the findings.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the bill for want of equity.

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APPENDIX

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379), as amended by the Transportation Act of 1920 (41 Stat. 456), are:

SEC. 13. (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, * * * there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, * * * the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, * * * to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act. (41 Stat. 456, 484.)

(4) Whenever in any such investigation the Commission, after full hearing, finds that any

such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers, parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (41 Stat. 456, 484.)

SEC. 15*a*. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to

prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: * * * (41 Stat. 456, 488).

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